

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MICHAEL LOBB

v.

THE UNITED STATES OF AMERICA

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CIVIL ACTION NO. G-04-361

ORDER

Before the Court is the United States of America' s (" the Government") Objections to the Report and Recommendation submitted by the Magistrate Judge on October 5, 2005. The Government essentially repeats its argument presented on summary judgment and points to discrepancies between Plaintiff' s deposition testimony and original report and statements made in his affidavit that responds to the Government' s Motion. The Court has carefully reviewed the various statements at issue here. Like the Magistrate Judge, this Court finds Plaintiff' s evidence elusive, but it also finds the Government' s Motion to be less than clear in its presentation of the factual background relied on to carry the Government' s burden of proof that Plaintiff presents no evidence to support his allegations.

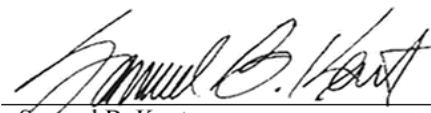
After carefully reading the documents in this case, the Court can only conclude that a serious dispute about the facts involved in this incident continues to divide the two parties, and it is one that this Court cannot say as a matter of summary judgment shows that Plaintiff' s evidence is insufficient. While the Court is far from convinced by Plaintiff' s factual evidence, and is specifically troubled by

the differences between Plaintiff's affidavit and deposition testimony, the burden of proof remains on the Government to demonstrate that summary judgment is appropriate. But the Court cannot say that the affidavit is merely manufactured to raise an issue of material fact or that it is so inconsistent with previous testimony as to be no summary judgment evidence at all. In order to find otherwise, the Court would be required to make significant credibility determinations that are not permitted on summary judgment.

Having given this matter *de novo* review under 28 U.S.C. § 636(b)(1)(C), this Court finds that Defendant's Objections are insufficient and that the Report and Recommendation should be **ACCEPTED**.

Accordingly, it is **ORDERED** that the Defendants' Motion for Summary Judgment (Instrument No. 19) is **DENIED** and that the above-titled action is referred back to the Magistrate Judge for further consideration.

DONE at Galveston, Texas this 31st day of October, 2005.



Samuel B. Kent
United States District Judge